INDEX

418970—57——1

CITATIONS

Cases—Continued

Statutes:

Statutes—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 540

CIVIL AERONAUTICS BOARD, PETITIONER

v.

IDA MAE HERMANN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD

OPINIONS BELOW

The memorandum of the district court (R. 143–144) is not reported. The opinion of the court of appeals (R. 167–173) is reported at 237 F. 2d 359.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1956 (R. 173–174). The petition for a writ of certiorari was filed on October 31, 1956, and was granted on January 21, 1957 (R. 174). The jurisdiction of this Court is conferred by 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Civil Aeronautics Board, in order to obtain judicial enforcement of subpoenas *duces tecum* (issued during an administrative proceeding) for production of groups of documents, is required to satisfy the district court that *each* of the documents is "relevant and material" to the issues in the proceeding, and is in the possession of the person to whom the subpoena is directed.

2. Whether the Board, prior to issuing such subpoenas, is required (*a*) to "take testimony" in a preliminary administrative hearing to determine the existence and location of the documents, and then (*b*) to inspect the documents, in order to determine their relevancy and materiality.

STATUTE INVOLVED

Pertinent provisions of the Civil Aeronautics Act of 1938, as amended, 52 Stat. 977, 49 U. S. C. 401 *et seq.*, are set forth in the appendix.

STATEMENT

On October 14, 1954, the Civil Aeronautics Board instituted an administrative enforcement proceeding against a group of individuals and business entities who collectively constitute, and operate as, the "Skycoach" air travel system (R. 14–38). The respondents in that proceeding are two irregular air carriers (Great Lakes Airlines and Currey Air Transport); two individuals (Ida Mae and Irving E. Hermann); a partnership of such individuals engaged in the own-

ership and leasing of aircraft (Nevada Aero Trades Company); two corporations which supply gasoline products and perform banking functions, respectively (Air International, Inc., and Great Lakes Airlines Agency, Inc.); and twelve "Skycoach" ticket agency corporations.

The principal charges made by the Board's complaint (R. 15–35) were as follows:

1. The individual respondents have acquired and maintained control of the other respondents, in violation of Section 408 (a) of the Act (49 U. S. C. 488 (a)). This has been accomplished through nominees or stock ownership; control of property, employees and equipment; leasing of aircraft; control of traffic solicitation and handling; financial management and control; and agreements, arrangements, and understandings of various types (R. 24–25, 26–27, 32–33).

2. The two air carrier respondents, through agreements between themselves and the other respondents, have collectively held out and operated regular and frequent air transportation service between designated points, in violation of Section 401 of the Act (49 U. S. C. 481) and Part 291 of the Board's Economic Regulations (14 CFR 291.1 *et seq.*) (R.19–22).[1] The carriers and ticket agents have, on numerous occasions, violated the Board's Economic Regulations with respect to methods of ticketing passengers, the form of tickets used, and agreements between the carriers and the ticket agents (R. 30–32).

[1] When the complaint issued, there was an outstanding Board order, entered in August, 1952, which directed one of the carriers to cease and desist from similar violations (R. 20).

3. All of the foregoing violations were knowing and wilful, and were deliberately planned and executed for the purpose of evading and circumventing the Act and the regulations promulgated thereunder, and for the purpose of concealing from the Board the true nature of the operation (R. 34).

The complaint sought revocation of the operating authority of the two carriers, and a cease-and-desist order against the other respondents (R. 35).

In the course of this proceeding, the Hearing Examiner issued a number of subpoenas *duces tecum* directed to several of the respondents, their officers and employees, and independent auditors and advertising agencies under contract with them (R. 39–60). The subpoenas called for the production of the following categories of documents: (1) financial and corporate records, including personal income tax returns; (2) correspondence, memoranda, and agreements; (3) personnel records; (4) data relating to ownership, identification, and utilization of aircraft and assignment of flight personnel; (5) advertising material disseminated to the public by radio, newspapers, display posters, and business cards; (6) airline tickets, including flight coupons, auditor and agent coupons, and specimens of tickets and exchange orders. Although most of the documents were designated by groups, particular documents also were specified.

Respondents moved to quash the subpoenas on the grounds, *inter alia*, that they were vague, excessively broad and unreasonable in scope, oppressive and burdensome, and constituted a general fishing expedition into their affairs (R. 64). The motion was denied by

the Hearing Examiner (R. 61), and then by the Board, which held that:

> The subpoenas are not vague and indefinite, or incapable of understanding. Each one specifies the period concerning which documents and records are to be produced where appropriate, and describes the desired materials with particularity. In the light of the charges against the respondents, and particularly those relating to common control and activities constituting air transportation on the part of the non-carrier respondents, it does not appear to us that the subpoenas are excessively broad or unreasonable in scope. In this connection, we note that Section 1004 of the Act specifically authorizes the issuance of subpoenas for the "production of ALL books, papers, and documents relating to any matter under investigation." The materials requested appear to be relevant to the matters under investigation here * * *. [R. 64–65]
>
> While certain of the subpoenas request numerous categories of documents and records of the respondents, there is no factual showing of the actual volume of materials involved, or that compliance will be unduly burdensome or oppressive * * *. [The subpoenas] do not constitute fishing expeditions, but rather are requests for material relevant to previously defined charges and issues. [R. 65–66] [2]

[2] The Board pointed out (R. 65) that, "[t]o the extent that compliance might require the yielding up of books and records necessary for the conduct of day-to-day business, or prove otherwise oppressive, the Examiner upon a proper showing to this effect has ample authority to permit an examination and

Respondents refused to comply with the subpoenas (R. 13), and the Board then filed in the district court a petition for their enforcement (R. 3–13). The court (Judge Peirson M. Hall) initially continued the cause for ten days, on condition that certain of the respondents make the records available at their places of business to representatives of the Board (R. 115–116). The inspection proved abortive, however, because the respondents failed to produce many of the items covered by the subpoenas (R. 117–126). After further hearings, the district court on May 17, 1955 entered an order enforcing the subpoenas substantially as issued (R. 144).[3] In a memorandum (R. 143), the court stated:

> In laying the subpoenas alongside the charges in the Complaint, this Court cannot say that any of the documents or things called for in any of the subpoenas are immaterial or irrelevant to the proceedings before the Board, without an examination of all of the documents and things themselves, which this Court is not called upon to do at this stage of the proceedings.[4]

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copying of the materials at the places of business involved, and under conditions which will produce a minimum of interference with business activities."

[3] The order superseded a prior order of enforcement which the court had entered on April 29, 1955, following the unsuccessful inspection (R. 126–129).

[4] The court staggered the return dates of the subpoenas, "so that the respondents will not be deprived of all of their books and records at the same time" (R. 143; see R. 145).

On appeal, the court of appeals reversed the district court's order of enforcement, and remanded for further proceedings.[5]

The court, in an opinion by Circuit Judge Fee, held (R. 170–171) that, "[i]n order to prevent their action from being arbitrary and oppressive," the Board should observe the following procedures in issuing subpoenas *duces tecum:*

1. It should first call the individuals concerned "and take testimony as to the existence and custody of the documents" and thus establish their "[m]ateriality and relevance to the issues before the Board."

2. In the exercise of its "power of inspection," the Board should then examine, photograph and copy "all the documents * * * without regard to materiality and relevancy."

3. If, after the inspection, the Board finds that there probably are other documents "relevant and material to the issue" or that they are being concealed, "then again a witness can be called and examined regarding these features."

4. Subpoenas should be issued only after the foregoing proceedings, and they "should not designate all the documents in the class, but only those which the Board has found are in the possession or under the control of the persons to whom directed and which are relevant and material to the issue."

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[5] The district court's order had been stayed pending appeal (R. 154, 161).

Upon a petition for enforcement of the subpoenas, the district court must determine "whether *each* of the documents subpoenaed is relevant and material" (R. 171). [Emphasis added.]

The court of appeals directed the district court, upon remand, to determine (by inspecting the documents, if necessary) whether the "individual documents" in the possession of the persons to whom the subpoena is directed (1) "have been sufficiently defined and described," (2) whether "each is material and relevant," and (3) whether the demand is "oppressive and unreasonable" (R. 173). The court of appeals also directed the district court to consider whether the income tax returns which had been subpoenaed constituted an invasion of the "privacy of third persons" because such returns "relate entirely to their personal affairs" (R. 172–173).

SUMMARY OF ARGUMENT

I

Section 1004 (b) of the Civil Aeronautics Act authorizes the Civil Aeronautics Board to require by subpoena the production of "all books, papers, and documents relating to any matter under investigation." Despite this broad authority, the court of appeals held that the Board may obtain judicial enforcement of a subpoena *duces tecum* for production of groups of documents only by showing that "each" of the documents subpoenaed is relevant and material, and is in the possession or control of the person from whom production is sought. This ruling is contrary to the settled law in this field, would most seriously

interfere with the efficient conduct of administrative proceedings, and would impose a heavy burden upon the courts.

A. This Court and various courts of appeals (including the court below in at least two earlier cases) consistently have enforced or upheld administrative subpoenas *duces tecum* (issued under statutory provisions similar to those in the instant case) designating documents by broad classes, upon a showing that the material sought is "not plainly incompetent or irrelevant to any lawful purpose" of the agency (*Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501, 509), or is generally "relevant to the inquiry" (*Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 209). With the exception of the decision below (and two other recent decisions by the same court), we know of no appellate case which has required the Government to establish the relevancy of individual documents. Questions as to the relevancy and materiality of individual documents first become ripe for determination when the documents are offered in evidence at the administrative hearing; they are not ripe when the district court is called upon, preliminarily, to enforce subpoenas covering groups of documents.

Ordinarily, the relevancy of particular documents can be determined only in the factual context of the hearing as it develops, and not in preliminary enforcement proceedings. Any irrelevant documents which are offered in evidence presumably will be excluded by the examiner or disregarded by the Board; and any reliance by the Board on improper evidence

can be fully challenged on judicial review of any final order which the Board may enter against respondents.

The settled rule that courts will enforce administrative subpoenas calling for groups of documents which are generally relevant would not, as the court of appeals suggested, turn the district court into a rubber stamp for the agency. To an application for enforcement of a subpoena, "appropriate defence may be made." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 49. Thus, the district court has ample scope to exercise its discretion to protect against arbitrary use of the subpoena power. But, in the absence of any showing of arbitrariness (and none has been here shown), the Government is entitled to enforcement.

The procedures required by the court of appeals would turn many subpoena enforcement proceedings into virtually full dress hearings on the merits, both before the agency and in the courts. Before issuing subpoenas, the Board would be required (1) to "take testimony" to determine the existence and location of the documents, (2) to inspect the documents, and (3) to call witnesses again if such inspection indicates that there may be other pertinent material. Thus, at the outset of the administrative proceeding, there would be a series of protracted preliminary hearings in which the agency would be required to ascertain the existence, and investigate the relevancy, of perhaps hundreds, or even thousands, of documents. The enforcement proceedings in the district court would be almost equally protracted. Finally, if the

subpoenas ultimately were enforced, the same questions as to the relevancy and materiality of individual documents would again have to be determined by the examiner upon offer of the documents in evidence. The practical consequence of such procedures would be seriously to interfere with the efficient conduct of administrative proceedings and to place a heavy and unnecessary burden on the courts.

B. The Board is not required to show as part of its affirmative case that "'the documentary evidence called for [is] * * * in the possession or under the control of the witness * * *.'" *Nelson* v. *United States*, 201 U. S. 92, 115. The appropriate officers of firms whose records are sought, or the individuals whose personal records are sought, may properly be presumed to have possession thereof. Respondents have never alleged that they do not possess or control the subpoenaed material, and they would not be held in contempt for failing in good faith to produce books and records not in their possession. Requiring the agency to prove possession and control would serve no valid purpose and would further delay the conduct of administrative proceedings.

C. Nor is the Board required, as the court of appeals held, to exercise its statutory power to inspect air carrier records before exercising its subpoena powers. The two powers are separate and independent, and the subpoena power is neither qualified by, nor dependent upon the prior exercise of, the inspection power. Moreover, the latter power extends only to records of air carriers and persons having

control of, or affiliated with, such carriers; it would not cover all records which the Board may require in its proceedings.

II

The district court properly enforced the subpoenas, since the material sought was broadly relevant to the issues in the administrative proceeding, and the subpoenas were not vague or indefinite, unduly broad or unnecessarily burdensome.

A. Since the issues in the Board's proceeding are unusually broad, the categories of material sought were also, of necessity, broad. The complaint charged that a number of ostensibly separate business entities are actually operated as cogs in a single system under the control of the two individual respondents. The specific categories of documents demanded are directly related to this charge. The books and records of the firms and individuals concerned will be particularly significant in determining the correctness of these allegations, since they will show the actual operating methods of the system, and the corporate, business, financial and control relationships among its members. Thus, "[t]he probable materiality of the documents is sufficiently indicated by the descriptions of their subject matter contained in the subpoena" (*Brown* v. *United States*, 276 U. S. 134, 143).

In enforcing the subpoenas on the ground that the material called for is not "immaterial or irrelevant to the proceedings before the Board," the district court applied the test enunciated in this Court in *Endicott*

Johnson Corp. v. *Perkins*, 317 U. S. 501, and *Penfield* v. *Securities and Exchange Commission*, 330 U. S. 585, 592. In any event, groups of documents which cannot be said to be "immaterial or irrelevant" to the issues in an administrative proceeding must necessarily be deemed material and relevant. While the issues in an administrative investigation often are broader than those in a formal complaint case, the same standard of relevancy and materiality governs the enforcement of subpoenas in both types of proceedings.

B. The subpoenas described the documents to be produced "with all of the particularity the nature of the inquiry and the Administrator's [Board's] situation would permit." *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 210, note 48. The subpoenas broke down the material demanded into specific categories, and individual documents were specified wherever the Board had sufficient information to enable it to do so. Each of the subpoenas also covered "a reasonable period of time" (*Brown* v. *United States*, 276 U. S. 134, 143)—substantially, the period during which the violations were alleged to have occurred. Since the material sought is generally relevant to the inquiry, the subpoenas were not unreasonable, and therefore raise no problem under the Fourth Amendment. Finally, respondents cannot successfully challenge the subpoenas as unusually burdensome, since "[t]here is no harassment when the subpoena is issued and enforced according to law" (*Oklahoma Press* case, *supra*, p. 217).

418970—57——3

C. The district court properly directed production of personal income tax returns of the individual respondents and a third person alleged to be a nominee through whom they have illegally acquired and now maintain control of a number of corporations. Since the complaint charges that a number of separate entities have been operated as a single business, personal income tax returns are relevant because they will show whether income from such entities was treated as coming from several sources or from a single source. Production of relevant personal income tax returns may be directed in private litigation under Rule 34 of the Federal Rules of Civil Procedure; *a fortiori,* a Government agency engaged in vindicating the public interest should have access to such returns.

ARGUMENT

INTRODUCTION

The Civil Aeronautics Act of 1938 gives the Board broad investigatory and enforcement powers. Section 205 (a) empowers the Board to conduct such investigations "as it shall deem necessary" to carry out the provisions of the Act and to perform its powers and duties thereunder. Section 1002 authorizes the Board, upon complaint or upon its own initiative, to institute investigations "with respect to anything done or omitted to be done by any person in contravention of any provision of this Act, or any requirement established pursuant thereto," or concerning "any

question [which] may arise" under, or "relating to the enforcement of," the Act. That Section also authorizes the Board to issue an "appropriate order" to compel compliance with any provision of the Act, or requirement thereunder, which it finds to have been violated. See, also, Section 415, which authorizes the Board "to inquire into the management of the business of any air carrier, and, to the extent reasonably necessary for any such inquiry, to obtain from such carrier, and from any person controlling or controlled by, or under common control with, such air carrier, full and complete reports and other information."

To enable it effectively to carry out its investigatory and enforcement duties, Section 1004 (b) of the Act gives the Board "the power to require by subpoena the attendance and testimony of witnesses and the production of *all* books, papers, and documents *relating to any matter under investigation.*" (Emphasis added.) In case of disobedience to a subpoena, the Board is authorized by subparagraph (c) to "invoke the aid of any court of the United States in requiring attendance and testimony of witnesses and the production of *such* books, papers, and documents under the provisions of this section" (emphasis added), and the court "may * * * issue an order requiring such person to appear before the [Board] * * * and produce books, papers, or documents if so ordered" (Section 1004 (d)).

Although the Act empowers the Board to subpoena "all" documents "relating to any matter under investigation" and to obtain judicial enforcement of subpoenas for "such" documents, the court of appeals held that the district court may order enforcement only if the Board establishes the materiality and relevancy of "each" document subpoenaed, and its possession by the person from whom production is sought. We shall show in Point I that this ruling is contrary to the settled law in this field, that it would most seriously interfere with the efficient conduct of administrative proceedings, and that it would impose a heavy burden upon the courts. We shall argue that the Board is entitled to judicial enforcement of subpoenas *duces tecum* for the production of groups of documents upon a showing that the material sought is "not plainly irrelevant" or is "generally relevant" to the administrative proceedings, and that it is not required to show either the relevancy or materiality of individual documents, or their possession by the person to whom the subpoena is directed. We shall also urge that, contrary to the view of the court below, the Board is not required to exercise its statutory authority to inspect air carrier records prior to issuing subpoenas for such records. In Point II, we shall argue that the district court applied the correct principles when it directed enforcement of the subpoenas involved in this case.

I

IN ORDER TO OBTAIN JUDICIAL ENFORCEMENT OF ADMINISTRATIVE SUBPOENAS *DUCES TECUM* FOR PRODUCTION OF GROUPS OF DOCUMENTS, THE BOARD IS NOT REQUIRED TO ESTABLISH THAT EACH OF THE DOCUMENTS IS RELEVANT AND MATERIAL AND IN THE POSSESSION OF THE PERSON TO WHOM THE SUBPOENA IS DIRECTED, BUT ONLY THE GENERAL RELEVANCY OF THE CATEGORIES OF DOCUMENTS INVOLVED

A. THE BOARD IS NOT REQUIRED TO SHOW THE RELEVANCY AND MATERIALITY OF EACH DOCUMENT SUBPOENAED

1. With the exception of the decision below, and two other recent decisions by the same court,[6] we know of no appellate case holding that judicial enforcement of a subpoena *duces tecum* for production of groups of documents requires a showing of the relevancy and materiality of each individual document covered by the subpoena. On the contrary, this Court consistently has enforced or upheld subpoenas *duces tecum* designating documents by broad classes upon a general showing that "the documents sought are relevant to the inquiry." *Oklahoma Press*

[6] *Hubner* v. *Tucker* (No. 14704, revised opinion of January 30, 1957); *Local 174, etc.* v. *United States*. (No. 14746, November 8, 1956, 56-1 USTC (CCH) ¶9136). Judge Fee wrote the opinion of the court in both cases. But cf. *Boren* v. *Tucker*, 239 F. 2d 767.

Publishing Co. v. *Walling*, 327 U. S. 186, 209; *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541; *Wheeler* v. *United States*, 226 U. S. 478; *Brown* v. *United States*, 276 U. S. 134; *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501; *Penfield Company* v. *Securities and Exchange Commission*, 330 U. S. 585, 591, 592; see *United States* v. *Morton Salt Co.*, 338 U. S. 632, 652.[1] Similarly, courts of appeals, including the court below in at least two earlier cases, have directed enforcement upon such a showing. *Newfield* v. *Ryan*, 91 F. 2d 700, 702–703 (C. A. 5), certiorari denied, 302 U. S. 729; *Hagen* v. *Porter*, 156 F. 2d 362 (C. A. 9), certiorari denied, 329 U. S. 729; *Mines and Metals Corp.* v. *Securities and Exchange Commission*, 200 F. 2d 317 (C. A. 9); *McGarry* v. *Securities and Exchange Commission*, 147 F. 2d 389, 392 (C. A. 10). In those cases which involved administrative subpoenas (see note 7, *supra*), the statutory provisions governing the scope of the subpoena power were, with one exception, substantially the same as those in the case at bar.[2]

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[1] The *Consolidated Rendering*, *Wheeler* and *Brown* cases involved grand jury subpoenas, and the question of their validity arose in contempt proceedings resulting from non-compliance rather than directly in enforcement proceedings. However, the settled limitations on the scope of inquiry into the validity of such subpoenas (see *Blair* v. *United States*, 250 U. S. 273) are equally applicable to administrative subpoenas. *Oklahoma Press* case, *supra*, p. 216; *United States* v. *Morton Salt Co.*, 338 U. S. 632, 642–643.

[2] The *Endicott Johnson* case involved Section 5 of the Walsh-Healey Public Contracts Act (49 Stat. 2038, 41 U. S. C. 39), which authorizes the Secretary of Labor to issue "orders requiring the attendance and testimony of witnesses and the pro-

In the *Endicott Johnson* case, *supra*, the subpoena called for production of "[a]ll time cards, time books, employees' wage statements and pay-roll records showing the hours worked each day and each week by, and the wages paid each pay period to, persons employed by the Endicott Johnson Corporation" in specified "factories or departments" and for specified periods ranging from 3 to 23 months (Record on Appeal, No. 142, October Term, 1942, pp. 8–9). In holding that

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duction of evidence under oath." In case of refusal to comply, the district court is empowered to require any person to "produce evidence if, as, and when ordered, and to give testimony relating to the matter under investigation or in question." The *Oklahoma Press* case dealt with the subpoena power of the Secretary under Section 9 of the Fair Labor Standards Act (52 Stat. 1065, 29 U. S. C. 209), which makes applicable to him the enforcement provisions of the Federal Trade Commission Act (38 Stat. 722, 15 U. S. C. 49). These provisions give the Trade Commission the "power to require by subpoena * * * the production of all such documentary evidence relating to any matter under investigation," and empower the district court, in case of disobedience, to require persons subpoenaed "to produce documentary evidence if so ordered, or to give evidence touching the matter in question." The *Penfield*, *Newfield*, *McGarry* and *Mines and Metals* cases all involved Sections 19 and 22 of the Securities Exchange Act of 1933 (48 Stat. 85, 86, 15 U. S. C. 77s, 77v), which respectively authorize the Securities and Exchange Commission to require by subpoena "the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry," and the district court to require any persons so subpoenaed "to produce documentary evidence if so ordered, or there to give evidence touching the matter in question."

The exception is *Hagen* v. *Porter*, which involved Section 202 of the Emergency Price Control Act, 56 Stat. 30, 50 U. S. C. Appendix 922 (1946 edition). That section authorized the Price Administrator by subpoena to require any person "to appear and produce documents."

the court of appeals had properly directed enforcement of the subpoena, this Court ruled (p. 509):

> The evidence sought by the subpoena was not plainly incompetent or irrelevant to any lawful purpose of the Secretary [of Labor] in the discharge of her duties under the Act, and it was the duty of the District Court to order its production for the Secretary's consideration.

Similarly, in the *Oklahoma Press* case, *supra*, the subpoena, which this Court upheld on the ground that "the documents sought are relevant to the inquiry," called for the production of

> All of your books, papers and documents showing the hours worked by and wages paid to each of your employees between October 28, 1938, and the date hereof [October 14, 1943 (Record on Appeal, No. 61, October Term, 1945, p. 11)], including all pay roll ledgers, time sheets, time cards and time clock records, and all your books, papers and documents showing the distribution of papers outside the State of Oklahoma, the dissemination of news outside the State of Oklahoma, the source and receipt of news from outside the State of Oklahoma, and the source and receipt of advertisements of nationally advertised goods [p. 210, note 46].

Compare *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, 363, where the Court, in holding that the Administrator of the Wage and Hour Division of the Department of Labor had no authority to delegate to his subordinates his statutory power under the Fair Labor Standards Act to sign and issue a subpoena *duces tecum*, pointed out that under the Act "the subpoena

may, as in this case, be used to compel production at a distant place of practically all of the books and records of a manufacturing business, covering considerable periods of time.'"

The standard of relevancy varies "in relation to the nature, purposes and scope of the inquiry." *Oklahoma Press* case, *supra*, p. 209. Thus, enforcement has been directed or approved upon a showing that the material sought is "not plainly incompetent or irrelevant to any lawful purpose of the agency" (*Endicott Johnson* case, *supra*; see, also, *McGarry* v. *Securities and Exchange Commission*, 147 F. 2d 389, 392 (C. A. 10)); that it is not "irrelevant to its [the agency's] statutory functions" (*Penfield* case, *supra*, p. 592); that it "related to the subject of inquiry" (*Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541, 554); that it "relate[s] to or touch[es] the matter under investigation * * *" (*Cudahy Packing Co.* v.

* Respondents may argue, as they did in the court of appeals, that the *Endicott Johnson* and *Oklahoma Press* cases are distinguishable on the ground that the principal issue there involved in the administrative proceedings was whether the Act was applicable to the companies, and not whether they had violated it. But in both cases the material subpoenaed was pertinent to the issue of violation as well as that of coverage. *Endicott Johnson* case, *supra*, pp. 508–509; *Oklahoma Press* case, *supra*, p. 189. The coverage issue arose because the companies had resisted enforcement in the district court on the ground, *inter alia*, that the Act was not applicable to them. This Court held (1) that the question of coverage initially was for the agency, not the district court, to decide; and (2) that since the material subpoenaed was broadly relevant to matters which the agency had authority to investigate, *i. e.*, coverage and violation, the agency was entitled to enforcement.

National Labor Relations Board, 117 F. 2d 692, 694 (C. A. 10)); that it is "probably relevant" to a lawful investigation (*Smith* v. *Porter,* 158 F. 2d 372, 374 (C. A. 9), certiorari denied, 331 U. S. 816); that it "was not shown to be plainly incompetent or irrelevant" (*Jackson Packing Co.* v. *National Labor Relations Board,* 204 F. 2d 842, 843 (C. A. 5)); or that the "subpoenas show on their face the probable materiality of the documents sought" (*Hagen* v. *Porter,* 156 F. 2d 362, 365 (C. A. 9), certiorari denied, 329 U. S. 729). However the test is phrased, this is clear: the requisite showing of relevancy and materiality applies only to the categories of documents sought, and need not be made in relation to each of the individual documents comprising each category.

In *Consolidated Rendering Co.* v. *Vermont,* 207 U. S. 541, this Court upheld a state court judgment holding a corporation in contempt for refusing to obey a grand jury subpoena calling for the production of various books and records covering a 34-month period. In rejecting the contention that the subpoena was too broad, the Court stated (p. 554):

> But unless it can be said that the court or grand jury never has any right to call for all the books and papers, or correspondence, between certain dates and certain persons named, in regard to a complaint which is pending before such court or grand jury, we think the objection here made is not well founded. We see no reason why all such books, papers and correspondence which related to the subject of inquiry, and were described with reasonable

detail, should not be called for and the company directed to produce them. Otherwise the State would be compelled to designate each particular paper which it desired, which presupposes an accurate knowledge of such papers, which the tribunal desiring the papers would probably rarely, if ever, have.

No less pertinent is this Court's statement in *United States* v. *Morton Salt Co.*, 338 U. S. 632, 642; "Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry."

Questions as to the relevancy and materiality of individual documents first become ripe for determination when the documents are offered in evidence at the administrative hearing; they are not ripe when the district court is called upon, preliminarily, to enforce subpoenas covering groups of documents. Cf. *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 44; *Nelson* v. *United States*, 201 U. S. 92, 114. Ordinarily, the materiality or relevancy of particular documents can be determined only in the factual context of the hearing as it develops. "Very often the bearing of information is not susceptible of intelligent estimate until it is placed in its setting, a tile in the mosaic." *In re Edge Ho Holding Corporation*, 256 N. Y. 374, 381. This vital practical consideration lies at the root of the settled rule that enforcement of administrative subpoenas *duces tecum* covering

groups of documents requires only a showing of the general relevancy of the material sought.[10]

Any irrelevant or immaterial documents which the Board's counsel may offer in evidence presumably will be excluded by the examiner, or by the Board on appeal from his initial decision. Moreover, reliance by the Board on improper evidence can be fully challenged upon judicial review of any final order which the Board may enter against respondents. The ruling of the court of appeals therefore cannot be justified as designed to protect respondents from injury resulting from possible admission of improper evidence in the administrative record.

The rule that courts will enforce administrative subpoenas calling for groups of documents which are generally relevant (or not plainly irrelevant) does not mean, as the court of appeals suggested (R. 172), that the district court is "required to rubberstamp with approval the administrative subpoenas." To an application for enforcement of a subpoena, "appropriate defence may be made." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 49. The application

[10] Even in the case of a subpoena *duces tecum* issued during the trial of a criminal case, it is sufficient that the Government attorney assert that the documents demanded are material; the question of materiality "cannot be determined in advance" but is to be determined when the documents "come to be offered." *United States* v. *Babcock*, 24 Fed. Cas. 908, 909 Case No. 14,484 (C. C., E. D. Mo.). For a like ruling on a subpoena *duces tecum* issued in the trial of civil antitrust cases, see *United States* v. *Terminal Railroad Ass'n*, 148 Fed. 486, 489 (C. C., E. D. Mo.). Cf., also, *United States* v. *United States District Court*, 238 F. 2d 713, 719–720 (C. A. 4), certiorari denied *sub nom. Valley Bell Dairy Co.* v. *United States*, 352 U. S. 981.

may properly be resisted on the ground that the subpoena is unduly vague or unreasonably burdensome (*Hale* v. *Henkel*, 201 U. S. 43); that the hearing is not of the kind which the statute authorizes (*Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407); that it would violate a personal privilege of the witness, like that against self-incrimination (cf. *Boyd* v. *United States*, 116 U. S. 616); or that the subpoena was not issued by a person authorized to do so (*Cudahy Packing Co.* v. *Holland*, 315 U. S. 357). Furthermore, enforcement may always be opposed on the ground that the evidence sought is plainly irrelevant to any lawful subject of inquiry. See *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 479. Thus, there is ample scope in the administrative proceeding for the district court to exercise its discretion to protect against the arbitrary use of the subpoena power. But, in the absence of any showing of such arbitrariness (and none has been made in the instant case, see Point II, *infra*), the Government is entitled to enforcement.[11]

Nothing in the legislative history of Section 1004 of the Civil Aeronautics Act suggests that Congress,

[11] The fact, relied on by the court of appeals (R. 171), that the filing of a petition for enforcement of an administrative subpoena institutes a "case or controversy" under the Constitution (*Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447), does not mean that such case or controversy involves the relevancy of each document. The Board's petition for enforcement alleged only that the "books, papers and documents required to be produced by said subpoenas * * * are, relevant and material to the prosecution of the proceeding" before the Board (R. 12), and the "case or controversy" thus instituted related only to the general relevancy of such material.

when it authorized the Board "to require by subpoena * * * the production of all books, papers and documents relating to any matter under investigation," intended to give the Board a narrower subpoena power than that possessed by other agencies. On the contrary, we think that this broad language reflects a Congressional intent that the Board, like other agencies, is entitled to judicial enforcement of its subpoenas *duces tecum* upon showing that the categories of material called for are generally pertinent to the inquiry.

2. Requiring the Board to show the relevancy and materiality of each document in order to obtain judicial enforcement of a subpoena *duces tecum* would contravene the requirements of "practicable administrative procedure" (*Morgan* v. *United States,* 298 U. S. 468, 481). For such a practice would turn many subpoena enforcement proceedings into virtually full dress hearings on the merits, both before the agency and in the courts. The result would be seriously and needlessly to handicap and delay administrative agencies in effectively exercising the powers which Congress has conferred upon them for obtaining information and, at the same time, to impose heavy burdens upon the courts.

Under the procedure specified by the court of appeals, the Board, before issuing any subpoenas, first would be required to "take testimony" to determine the existence and location of the documents, and then, in the exercise of its statutory power of inspection, examine, photograph and copy "all the docu-

ments * * * without regard to materiality and relevancy" (R. 170). If, after such hearing and inspection, the Board finds that the existence of other documents "relevant and material" to the issue is "probable," "then again a witness can be called and examined regarding these features" (R. 171). Thus, there would be a series of protracted hearings, conducted at the outset of an administrative proceeding and extending over possibly many months, in which the agency would be required to ascertain the existence, and investigate the relevancy, of perhaps hundreds, or even thousands, of documents. Moreover, since persons who refuse to comply with administrative subpoenas are equally unlikely to cooperate in aiding the preparation of such subpoenas, the agency frequently might require judicial aid in compelling preliminary testimony as to the existence and location of documents, and in securing their inspection. In short, years might elapse before the agency could even issue its subpoenas.

The actual enforcement proceedings in the district court would be almost equally protracted. For, assuming that the agency could demonstrate the relevancy and materiality of a large number of individual documents prior to the administrative hearing (but see *supra*, p. 23), the time required to do so would be substantial. The district court would apparently be obliged to consider, piece by piece, paper by paper, the disputes as to what should be yielded. Finally, if the subpoenas were at last enforced, questions as to

the relevancy and materiality of individual documents would still not be laid to rest. They might be raised anew upon the subsequent offer of such documents in evidence.

Mr. Justice Cardozo, while Chief Judge of the New York Court of Appeals, graphically warned of the dangers to the administrative process which would result if courts attempted to determine the relevancy of particular items of evidence when called upon to enforce subpoenas:

> Investigation will be paralyzed if arguments as to materiality or relevance, however appropriate at the hearing, are to be transferred upon a doubtful showing to the stage of a preliminary contest as to the obligation of the writ. Prophecy in such circumstances will step into the place that description and analysis may occupy more safely. Only where the futility of the process to uncover anything legitimate is inevitable or obvious must there be a halt upon the threshold.[12]

The practical consequence of the enforcement procedures specified by the court of appeals would be to deny agencies the authority to subpoena materials and records by general description or category. That power has been repeatedly upheld by this Court, and its availability is essential if administrative agencies and the courts are to function effectively in their coordinate spheres.

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[12] *In re Edge Holding Corporation*, 256 N. Y. 374, 381–382.

B. THE BOARD DOES NOT HAVE TO SHOW THAT THE DOCUMENTS ARE IN THE POSSESSION OR UNDER THE CONTROL OF THE PERSON TO WHOM THE SUBPOENA IS DIRECTED

The court below further erred, we believe, in holding that the Board, in order to obtain enforcement, was required to show that the documents are in the possession or under the control of the persons from whom production is sought. Although lack of possession or control may be asserted, in appropriate circumstances, as a ground for opposing enforcement, the agency is not required to show as part of its affirmative case that "the documentary evidence called for [is] * * * in the possession or under the control of the witness." *Nelson* v. *United States*, 201 U. S. 92, 115; *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322, 347.

Where, as here, production is sought of corporate or firm records, or of personal records of individuals, it may properly be presumed that the appropriate officers of such firms, or the individuals whose personal records are sought, do possess them. Nor is it unreasonable to place the burden of showing lack of possession upon the persons who have direct knowledge of that fact. Significantly, although respondents filed a motion to quash with the Board (R. 64), and a full answer (R. 68–74) to the Board's petition for enforcement in the district court, they did not contend in either document that they do not possess or control the subpoenaed material. Cf. *United States*

v. *Morton Salt Co.*, 338 U. S. 632, 653–654; *Nilva* v. *United States*, No. 37, this Term, decided February 25, 1957.

If respondents do not have the documents, and if "it does not appear that they have acted in bad faith or dispossessed themselves of books and records for the purpose of avoiding their production, they will not be in contempt for failure to produce books and records not within their possession." *McGarry* v. *Securities and Exchange Commission*, 147 F. 2d 389, 392–393 (C. A. 10). Requiring the agency to show possession and control of the documents subpoenaed would serve no valid purpose, and would further hinder and delay the conduct of administrative proceedings. See *supra*, pp. 26–28. The "ability [of respondents] to produce such books and records can best be inquired into initially at the hearing before the Commission [Board] and, if necessary, in further proceedings before the district court." *McGarry* case, *supra*, p. 393.

The court below previously had held, in affirming a district court order directing enforcement of subpoenas *duces tecum*, that it was immaterial that one of the persons to whom a subpoena was directed had "filed an affidavit alleging that he has neither custody nor control of all the documents here sought. This is a matter not relevant to this proceeding. The proper time to decide such an issue is when the order of the district court is disobeyed." *Mines and Metals Corp.* v. *Securities and Exchange Commission*, 200 F. 2d 317, 321; cf. *Hagen* v. *Porter*, 156 F. 2d 362, 366

(C. A. 9), certiorari denied, 329 U. S. 729. We submit that that prior ruling, and not the ruling in the instant case, was correct.

C. THE BOARD IS NOT REQUIRED TO EXERCISE ITS STATUTORY POWER TO INSPECT AIR CARRIER RECORDS PRIOR TO ISSUING SUBPOENAS FOR SUCH RECORDS

The court below stated (R. 170) that prior to issuing a subpoena the Board should not only "take testimony" to determine the existence and location of documents but should also, in the exercise of its statutory power of inspection of air carrier records and properties under Section 407 (e) of the Act, examine, photograph and copy "all the documents." Although this procedure was prescribed because of the court's erroneous view that the Government is required to show the relevancy of individual documents, it also involves an erroneous legal premise. For we think it clear that the Board is not required to exercise its inspection power before exercising its subpoena power.

Nothing in Section 1004 (b) even remotely suggests that the Board's broad power "to require by subpoena the * * * production of all books, papers, and documents relating to any matter under investigation" is qualified by, or depends upon the prior exercise of, the Board's authority to inspect air carrier records. On the contrary, the two powers are separate and independent of each other. See *Westside Ford, Inc.* v. *United States*, 206 F. 2d 627, 629–630, 634 (C. A. 9); *Porter* v. *Gantner & Mattern Co.*,

156 F. 2d 886, 889–890 (C. A. 9). Almost invariably, the Board has used its inspection power in its routine examinations of carrier books and records, and has exercised its subpoena power in other types of proceedings.

Inspection of a carrier's records, like the other burdensome practices prescribed by the court of appeals, would serve no useful purpose and would unnecessarily delay administrative proceedings (see *supra*, pp. 26–28). Moreover, the Board's inspection authority extends only to the records of air carriers and persons having control of, or affiliated with, air carriers, and it would not cover all records which the Board may require in its various proceedings, or, indeed, all the records sought in this case. Furthermore, there is no reason to suppose that persons who refuse to comply with administrative subpoenas would be any more willing to permit the Board to inspect their records. Cf. *United States* v. *United Distillers Products Corp.*, 156 F. 2d 872 (C. A. 2). The Board, therefore, would probably have to invoke the aid of the district court, pursuant to Section 1007 (a) of the Act, to compel compliance with its inspection order.

II

THE DISTRICT COURT PROPERLY ENFORCED THE SUBPOENAS

As we have shown in Point I, *supra*, the Board may issue subpoenas calling for production of documents which are described by broad categories; and it is entitled to enforcement of such subpoenas upon showing that the material sought is generally relevant (or

not plainly irrelevant), without having to show either the relevancy of individual documents or their possession or control by the persons to whom the subpoena is directed. "Necessarily * * * relevancy * * * [is] variable in relation to the nature, purposes and scope of the inquiry" (*Oklahoma Press Publishing Co.* v. *Walling,* 327 U. S. 186, 209). Thus, the breadth of the issues in the administrative proceeding determines the permissible reach of the subpoena power. Since the issues in the Board proceeding here involved are unusually broad, the categories of material sought were also, of necessity, broad.

We shall show that the documents called for by the subpoenas were not "plainly incompetent or irrelevant to any lawful purpose of the Secretary [Board] in the discharge of her [its] duties under the Act" (*Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501, 509), but, on the contrary, were clearly "relevant to the inquiry" (*Oklahoma Press* case, *supra*); that the subpoenas are not vague or indefinite, or unduly broad or unnecessarily burdensome; and that it was therefore "the duty of the District Court to order * * * production" of the material "for the Secretary's [Board's] consideration" (*Endicott Johnson* case, *supra*).

A. The basic issues in the Board's administrative proceeding are whether the two individual respondents have acquired control of two airlines and a number of affiliated companies, and whether they have operated a scheduled airline service, in violation of the Civil Aeronautics Act and the Board's regula-

tions. The complaint charged that a number of ostensibly separate business entities are actually operated as cogs in a single system under the control of the two individual respondents. In order to ascertain the correctness of these allegations, the books and records of the firms and individuals concerned will be particularly significant, since they will show the actual operating methods of the system, and the corporate, business, financial and control relationships among its members. Moreover, the books and records may be significant not only for what they affirmatively show, but also for what they do not show.

The specific categories of documents demanded are directly related to the charges in the complaint. For example, financial, corporate and personnel records, and data relating to aircraft operations, assignment of flight personnel and ticketing practices are plainly relevant to the allegations that the individual respondents acquired and are exercising control of the carriers "through nominees or stock ownership, control of property, employees and equipment, leasing of aircraft, control of traffic solicitation and handling, financial management and control and agreements and arrangements of various types" among respondents (R. 24–25); and that the carriers "have made and maintained agreements, and participated in arrangements, between themselves and the other respondents named in this complaint through which said carriers have held out and have operated regular and frequent services in air transportation between designated points collectively and at various times individually"

(R. 22). The material sought from respondents' advertising agency (R. 51–53; see R. 8) is relevant with respect to the allegations that respondents have held themselves out as offering a regular service and that they have operated and advertised air service under a single trade name, "Skycoach" (R. 27–29). The information sought with respect to tickets and ticketing practices is relevant with respect to the latter allegation, and also with respect to the allegations that respondents have violated the Board's ticketing regulations (R. 30–32) and have operated a regular service.

In sum, "[t]he probable materiality of the documents is sufficiently indicated by the descriptions of their subject matter contained in the subpoena" (*Brown* v. *United States*, 276 U. S. 134, 143). The allegations in the Board's complaint (see R. 143) and in its petition for enforcement further indicated the relevancy of the material sought. Respondents' general allegation, in their answer to the Board's petition for enforcement in the district court, that the documents sought "are not material to the issues" in the administrative proceeding (R. 72), did not rebut the Board's showing of materiality.[11] *Kilgore Nat. Bank* v. *Federal Petroleum Board*, 209 F. 2d 557, 560 (C. A. 5).

[11] The statements in the affidavit which respondent Ida Mae Hermann filed with the Board that "[i]t is difficult to imagine" the relevancy of certain data contained in aircraft maintenance logs, and that "most of the documents sought have no conceivable relation to the * * * proceeding" (R. 114–115) were no more persuasive.

Of course, short of making "an examination of all of the documents and things"—which, as the district court correctly pointed out (R. 143; see Point IA, *supra*), it "[w]as not called upon to do at this stage of the proceedings"—the court could do no more than determine the general relevancy of the material. The district court, in stating that it could not "say that any of the documents or things called for in any of the subpoenas are immaterial or irrelevant to the proceedings before the Board," applied the test enunciated by this Court in the *Endicott Johnson* and *Penfield* cases, *supra,* p. 21. But, in any event, we submit that groups of documents which cannot be said to be "immaterial or irrelevant" to the issues in an administrative proceeding must necessarily be deemed "material and relevant." In determining whether a subpoena for production of groups of documents should be enforced, the distinction between "relevant" and "not irrelevant" becomes one of semantics, not substance.

The court of appeals suggested (R. 172) that the "lines" for enforcement of administrative subpoenas "are much more sharply drawn" in "an adverse enforcement proceeding" than in "an administrative investigatory proceeding." If the court was merely stating that, since the issues in an investigation often are broader than those in a formal complaint case, the scope of the subpoena power may be correspondingly broader in the former, we have no disagreement. But if the court is suggesting that a stricter standard governs enforcement of subpoenas issued in adversary

proceedings than those issued in investigations, we think it is in error.[14]

The act does not so differentiate between the two types of proceedings; rather, it authorizes the Board to subpoena documentary material "relating to any matter under investigation." Nor do the decisions of this Court upon which we have relied (see *supra,* pp. 17–21) draw any such distinction. Concededly, the subpoenas involved in most of those cases were issued in preliminary investigations rather than in formal complaint cases. However, enforcement was not granted for that reason, but on the broader ground that where an administrative agency is acting within

[14] Adversary proceedings in the courts probably tend to be more formal than adversary proceedings before administrative agencies. Yet, the utilization, in civil suits, of the pre-trial discovery procedures authorized by the Federal Rules of Civil Procedure is not circumscribed in practice by detailed requirements comparable to those imposed by the court of appeals in the instant case. On the contrary, the dominant assumption has been that the discovery provisions are to be liberally administered so that there will be ready access to information which is or may prove to be relevant. See *Hickman* v. *Taylor*, 329 U. S. 495, 507. The moving party, to be sure, must show "good cause" (Rule 34) when he seeks production of the books and records of his adversary. But this certainly does not mean that there must be a series of pre-trial trials to determine whether each item sought will actually prove specifically relevant to issues which may emerge at the trial. See *United States* v. *United States Alkali Export Association*, 7 F. R. D. 256 (S. D. N. Y.); *Hawaiian Airlines* v. *Trans-Pacific Airlines*, 8 F. R. D. 449 (D. Hawaii); cf. *Societe Internationale, etc.* v. *Clark*, 9 F. R. D. 263 (D. D. C.) affirmed, *sub nom. Societe Internationale, etc.* v. *Brownell*, 225 F. 2d 532 (C. A. D. C.), certiorari denied, 350 U. S. 937, directing production of approximately 70,000 documents described by broad categories.

the scope of its statutory authority (as the Board concededly is doing here), it is entitled to the production of all documentary material which is broadly relevant to the performance of its duties. Furthermore, the material which was subpoenaed in the investigations in the *Endicott Johnson* and *Oklahoma Press* cases (see *supra*, pp. 19–20) would also have been relevant in any formal adversary proceedings which the Secretary subsequently might have instituted. In the instant case, as we have shown, the material subpoenaed plainly was relevant to the issues in the administrative proceeding, and its relevance is no less because the inquiry has ripened from an informal investigation into a formal adversary proceeding.

B. Respondents may argue, as they did before the Board and the lower courts, that the subpoenas are vague and indefinite, unduly broad, and unnecessarily burdensome. We submit that they are not.

1. The subpoenas described the documents to be produced "with all of the particularity the nature of the inquiry and the Administrator's [Board's] situation would permit." *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 210, note 48. Since the Board itself could not know precisely what books and records were kept by respondents and by the other persons to whom the subpoenas were directed, the subpoenas necessarily could only "specif[y] * * * with reasonable particularity, the subjects to which the documents * * * relate." *Brown* v. *United States*, 276 U. S. 134, 143. But the subpoenas broke down the material demanded into specific categories (see, *e. g.*, the

various subdivisions of subjects in the subpoenas issued to respondents Ida Mae and Irving E. Hermann, R. 40–42, 44–46), and "the description contained in the subpoena was sufficient to enable * * * [the recipient] to know what particular documents were required and to select them accordingly." *Brown* v. *United States, supra.* Furthermore, the subpoenas specified individual documents wherever the Board had sufficient information to enable it to do so. See R. 42–43, 50, calling for the production of specified "Flight, auditor and agent coupons" on designated flights.

Each of the subpoenas also "specifies a reasonable period of time." *Brown* v. *United States, supra.* The various violations charged in the Board's complaint were alleged to have taken place between December 1, 1951, and October 14, 1954, the date of issuance (R. 22–34). The subpoenas called for documents covering the years 1952 through 1954 and, in some instances, through February or March 1955, the date of their issue (R. 39–60), *i. e.,* the period involved in the complaint. Plainly, the subpoenas were properly limited in time as well as in scope.

Since, as we have previously shown, the material sought is generally relevant to the inquiry, the subpoenas were not unreasonably broad. Respondents' contention (R. 64, 72) that the subpoenas constituted an unreasonable search and seizure has no substance, since compulsory compliance with a reasonable subpoena *duces tecum* does not violate the Fourth Amendment. *Hale* v. *Henkel,* 201 U. S. 43, 76; *Wilson* v. *United States,* 221 U. S. 361, 376; *Oklahoma Press* case, *supra,* pp. 195–196, 208–209.

Nor can respondents successfully challenge the subpoenas as burdensome. "There is no harassment when the subpoena is issued and enforced according to law." *Oklahoma Press* case, *supra*, p. 217; *Fleming* v. *Montgomery Ward*, 114 F. 2d 384 (C. A. 7), certiorari denied, 311 U. S. 690; *McGarry* v. *Securities and Exchange Commission*, 147 F. 2d 389 (C. A. 10); *Westside Ford* v. *United States*, 206 F. 2d 627 (C. A. 9). Although the subpoenas called for production of many documents, the number was not unduly large in the light of the complex issues before the Board. Cf. *Cudmore* v. *Bowles*, 145 F. 2d 697, 699 (C. A. D. C.), certiorari denied, 324 U. S. 841, upholding enforcement of a subpoena covering 20,000 invoices. The district court took pains to avoid any undue burden which might be put on respondents if they were "deprived of all of their books and records at the same time," by staggering the return dates of the subpoenas (R. 143).

C. Among the documents directed to be produced pursuant to the subpoenas were certain personal income tax returns. The court of appeals directed the district court to consider on remand whether the subpoenas, insofar as they require production of those returns, invade the "privacy of third persons" because such documents "relate entirely to their personal affairs" (R. 172–173). But the persons from whom such returns are sought are not strangers to the case, and the returns plainly are relevant to the issues in the proceeding. Two of the persons from whom the returns are sought (the Hermanns) are

respondents in the Board's proceeding and the third person (Robert M. Smith) is alleged to be a nominee through whom the Hermanns have illegally acquired and now maintain control of a number of corporations (R. 14–35). Since one of the charges in the complaint is that the individual respondents have operated a number of separate entities as a single business, their personal income tax returns obviously are relevant as showing whether income from such entities was treated as coming from several sources or from a single source. If, as respondent Ida Mae Hermann contended in an affidavit filed with the district court in opposition to the petition for enforcement, she would be "greatly damaged and injured in her personal financial affairs and will be caused extreme embarrassment" should "her personal financial affairs [be] revealed in a public hearing" (R. 114), she could have filed with the Board an application for confidential treatment of her returns.[15] Indeed, she may still file such an application.

The court below previously had upheld an order enforcing an administrative subpoena for production, *inter alia*, of personal income tax returns. *Smith* v. *Porter*, 158 F. 2d 372, 373 (C. A. 9), certiorari denied, 331 U. S. 816. The weight of authority appears to be that, under Rule 34 of the Federal Rules of Civil

[15] Section 1104 of the Act authorizes the Board, upon the filing of a written objection, to withhold from public disclosure any information obtained by it whose disclosure, in its judgment, would adversely affect the interest of the objector and which is not required by the public interest.

Procedure, production of relevant personal income tax returns may be directed in private litigation. *June* v. *Peterson Co.*, 155 F. 2d 963, 967 (C. A. 7); *Konczakowski* v. *Paramount Pictures*, 19 F. R. D. 361, 362 (S. D. N. Y.) and cases there cited; see *Mullen* v. *Mullen*, 14 F. R. D. 142, 143 (D. Alaska). *A fortiori*, a Government agency engaged in vindicating the public interest should have access to such returns. The district court correctly ordered production of copies of the tax returns.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded with directions to affirm the order of the district court enforcing the subpoenas.

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APPENDIX

The Civil Aeronautics Act of 1938, as amended, 52 Stat. 977, 49 U. S. C. 401 *et seq.*, provides in pertinent part as follows:

SEC. 205. (a) The Authority [Board] is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out such provisions and to exercise and perform its powers and duties under this Act. [49 U. S. C. 425]

* * * * *

SEC. 401. (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Authority [Board] authorizing such air carrier to engage in such transportation: * * * [49 U. S. C. 481]

* * * * *

SEC. 407. * * *

* * * * *

(e) The Authority [Board] shall at all times have access to all lands, buildings, and equipment of any carrier and to all accounts, records, and memoranda, including all documents, papers, and correspondence, now or hereafter existing, and kept or required to be kept by air carriers; and it may employ special agents or auditors, who shall have authority under the orders of the Authority [Board] to inspect and examine any and all such lands, buildings, equipment, accounts, records, and memoranda.

The provisions of this section shall apply, to the extent found by the Authority [Board] to be reasonably necessary for the administration of this Act, to persons having control over any air carrier, or affiliated with any air carrier within the meaning of section 5 (8) of the Interstate Commerce Act, as amended. [49 U. S. C. 487]

* * * * *

SEC. 408. (a) It shall be unlawful unless approved by order of the Authority [Board] as provided in this section—

(1) For two or more air carriers, or for any air carrier and any other common carrier or any person engaged in any other phase of aeronautics, to consolidate or merge their properties, or any part thereof, into one person for the ownership, management, or operation of the properties theretofore in separate ownerships;

(2) For any air carrier, any person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to purchase, lease or contract to operate the properties, or any substantial part thereof, of any air carrier;

(3) For any air carrier or person controlling an air carrier to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any person engaged in any phase of aeronautics otherwise than as an air carrier;

(4) For any foreign air carrier or person controlling a foreign air carrier to acquire control, in any manner whatsoever, of any citizen of the United States engaged in any phase of aeronautics;

(5) For any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever;

(6) For any air carrier or person controlling an air carrier to acquire control, in any manner whatsoever, of any person engaged in any phase of aeronautics otherwise than as an air carrier; or

(7) For any person to continue to maintain any relationship established in violation of any of the foregoing subdivisions of this subsection. [49 U. S. C. 488]

* * * * * *

SEC. 415. For the purpose of exercising and performing its powers and duties under this Act, the Authority [Board] is empowered to inquire into the management of the business of any air carrier and, to the extent reasonably necessary for any such inquiry, to obtain from such carrier, and from any person controlling or controlled by, or under common control with, such air carrier, full and complete reports and other information. [49 U. S. C. 495]

* * * * * *

SEC. 1002. (a) Any person may file with the Authority [Board] a complaint in writing with respect to anything done or omitted to be done by any person in contravention of any provision of this Act, or of any requirement established pursuant thereto. If the person complained against shall not satisfy the complaint and there shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of the Authority [Board] to investigate the matters complained of. Whenever the Authority [Board] is of the opinion that any complaint does not state facts which warrant an investigation or action on its part, it may dismiss such complaint without hearing.

(b) The Authority [Board] is empowered at any time to institute an investigation, on its own initiative, in any case and as to any matter or thing concerning which complaint is author-

ized to be made to or before the Authority [Board] by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. The Authority [Board] shall have the same power to proceed with any investigation instituted on its own motion as though it had been appealed to by complaint.

(c) If the Authority [Board] finds, after notice and hearing, in any investigation instituted upon complaint or upon its own initiative, that any person has failed to comply with any provision of this Act or any requirement established pursuant thereto, the Authority [Board] shall issue an appropriate order to compel such person to comply therewith. [49 U. S. C. 642]

* * * * *

SEC. 1004. (a) Any member or examiner of the Authority [Board], when duly designated by the Authority [Board] for such purpose, may hold hearings, sign and issue subpenas, administer oaths, examine witnesses, and receive evidence at any place in the United States designated by the Authority [Board]. In all cases heard by an examiner or a single member the Authority [Board] shall hear or receive argument on request of either party.

(b) For the purposes of this act the Authority [Board] shall have the power to require by subpena the attendance and testimony of witnesses and the production of all books, papers, and documents relating to any matter under investigation. Witnesses summoned before the Authority [Board] shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

(c) The attendance of witnesses, and the production of books, papers, and documents, may be required from any place in the United

States, at any designated place of hearing. In case of disobedience to a subpena, the Authority [Board], or any party to a proceeding before the Authority [Board], may invoke the aid of any court of the United States in requiring attendance and testimony of witnesses and the production of such books, papers, and documents under the provisions of this section.

(d) Any court of the United States within the jurisdiction of which an inquiry is carried on may, in case of contumacy or refusal to obey a subpena issued to any person, issue an order requiring such person to appear before the Authority [Board] (and produce books, papers, or documents if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. [49 U. S. C. 644]

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SEC. 1007. (a) If any person violates any provision of this Act, or any rule, regulation, requirement, or order thereunder, or any term, condition, or limitation of any certificate or permit issued under this Act, the Authority [Board], its duly authorized agent, or, in the case of a violation of section 401 (a) of this Act, any party in interest, may apply to the district court of the United States, for any district wherein such person carries on his business or wherein the violation occurred, for the enforcement of such provision of this Act, or of such rule, regulation, requirement, order, term, condition, or limitation; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or other process, mandatory or otherwise, restraining such person, his officers, agents, employees, and representatives, from further violation of such provision of this Act or of such rule, regulation,

requirement, order, term, condition, or limitation, and enjoining upon them obedience thereto. [49 U. S. C. 647]

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SEC. 1104. Any person may make written objection to the public disclosure of information contained in any application, report, or document filed pursuant to the provisions of this Act or of information obtained by the Authority [Board], the Administrator, or the Air Safety Board pursuant to the provisions of this Act, stating the grounds for such objection. Whenever such objection is made, the Authority [Board], or the Air Safety Board if the information was obtained by it, shall order such information withheld from public disclosure when, in its judgment, a disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public. The Authority [Board] is authorized to withhold publication of records containing secret information affecting national defense. [49 U. S. C. 674]

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